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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

AKZO N.V., ENKA B.V., ARAMIDE MAATSCHAPPIJ v.o.f.,
and AKZONA INCORPORATED,

Petitioners,

v.

U.S. INTERNATIONAL TRADE COMMISSION and
E.I. DU PONT DE NEMOURS & COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

**BRIEF IN OPPOSITION FOR RESPONDENT
E.I. DU PONT DE NEMOURS & COMPANY**

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QUESTIONS PRESENTED

After finding that petitioners' unlicensed use in The Netherlands of a manufacturing process invented and patented by E.I. Du Pont de Nemours & Co. ("Du Pont") constitutes an unlawful and unfair act which threatens to destroy or substantially injure the domestic U.S. aramid fiber industry created by Du Pont, the U.S. International Trade Commission ("ITC") entered an order pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, excluding imports of aramid fiber manufactured by petitioners. The questions presented, which are limited to the legitimacy and procedures of the ITC, are:

1. Whether petitioners were denied due process of law by ITC procedures protecting both petitioners' and Du Pont's trade secret/confidential business information from disclosure to each other's employees where (i) more than 90 of petitioners' non-employee representatives (legal counsel and consultants) had full access to all of Du Pont's protected information; (ii) petitioners did not invoke the ITC's dispute resolution procedure for challenging the designation of any information as "confidential"; and (iii) petitioners neither tendered evidence showing prejudice or need, nor countered sworn testimony that disclosure to their in-house counsel and marketing manager would seriously prejudice Du Pont.

2. Whether Section 337 delegates to the ITC judicial power that is reserved to courts under Article III of the Constitution notwithstanding that the exclusion of imports by the ITC under Section 337 is an exercise of delegated Congressional power to regulate foreign commerce that is subject to disapproval by the President and is not *res judicata* on patent issues.

3. Whether the ITC's procedures denied "national treatment" to petitioners' aramid fiber under the provisions of international agreements to which the United States and The Netherlands are parties.

(i)

STATEMENT PURSUANT TO RULE 28.1

Respondent E.I. Du Pont de Nemours & Company ("Du Pont") has the following publicly-held subsidiary or affiliated companies: Du Pont Canada, Inc.; Biotech Research Laboratories, Inc.; Molecular Biosystems Inc.; and Conoco Exploration Limited. Though it is not a subsidiary or affiliate of Du Pont, the Seagram Company, Ltd. (through wholly-owned subsidiary companies) owns approximately 22 percent of Du Pont's common stock.

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**BRIEF IN OPPOSITION FOR RESPONDENT
E.I. DU PONT DE NEMOURS & COMPANY**

STATEMENT OF THE CASE

Petitioners attack an order issued by the ITC under Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, excluding from importation into the United States aramid fiber made by petitioners using a process patented by Du Pont. Section 337 prohibits "unfair acts in the importation of articles into the United States . . . the effect or tendency of which is to destroy or substantially injure" an efficient industry operating in the United States; it includes as an "unfair act" the importation of articles that, if manufactured within the United States, would infringe a U.S. process patent. Section 337a, 19 U.S.C. § 1337a.

Petitioners include the world's largest industrial fiber manufacturer, Enka, B.V., and its publicly-subsidized joint venture with the Dutch Government, Aramide Maatschappij v.o.f., which was organized to manufacture aramid fiber in The Netherlands for sale throughout the world.

A. The Issues Before the ITC.

On the basis of an extensive investigation which included evidentiary hearings before an administrative law judge ("ALJ") possessing a degree in chemistry and long experience as a patent lawyer,¹ the ITC found that petitioners were using a process for making aramid fiber that had been invented and patented in the United States by Du Pont. The ITC also found, as an element of petitioners' violation of Section 337, that imports of petitioners' aramid fiber into the United States threatened to "destroy or substantially injure" the domestic aramid fiber industry created by Du Pont in the United States.

The evidence detailed Du Pont's investment of more than half a billion dollars in research, development and manufacturing facilities over nearly 15 years to create and market the superstrong but lightweight fiber, which Du Pont markets under the name Kevlar®.² The ITC

¹ Petitioners took 83 depositions (71 of Du Pont personnel) generating more than 15,000 pages of transcript. They obtained access to more than 350,000 pages of Du Pont's business records through discovery, and submitted more than 50,000 pages of documentary exhibits at the hearings. Even though the parties' direct testimony was filed in written form weeks before the hearings, the hearings still consumed more than 14 trial days, 10 of which were devoted to cross-examination of Du Pont's witnesses. The hearing transcript exceeded 5,000 pages.

² Kevlar® is pound-for-pound five times stronger than steel and possesses unmatched resistance to heat and stretch. This "superfiber" is used in aerospace, military and other high-technology applications, as well as for asbestos replacement, bullet-protective apparel, ropes and cables, and automotive tires.

found that imports of petitioners' aramid fiber—timed to coincide with the growth of demand generated by Du Pont's efforts—would, over the remaining five-year life of Du Pont's process patent, cost Du Pont more than \$200 million in earnings that would otherwise help justify the heavy investment Du Pont made in reliance upon the effectiveness of its lawful U.S. patent rights. (J.A. 1106a.)

The ITC's determinations against petitioners on these issues, which are supported by extensive findings, are not challenged in this Court.³

B. The ITC's Protective Order.

The protective order that is the principal focus of the petition to this Court (*see* Pet. 33a-39a) was patterned upon orders frequently issued in Section 337 cases and in other complex proceedings. It permitted either party *initially* to designate qualifying trade secrets and competitively sensitive information as "confidential." Disclosure of such protected information was limited to the adversary's outside legal counsel, consultants, ITC personnel and authorized Government agencies. (*See* Pet. 34a-36a.) A party's initial designation of information as "confidential" was not conclusive. Paragraph 10 of the protective order enabled every party to object to any confidentiality designation, in which case the dispute would be promptly resolved by the ALJ or the ITC if the parties could not agree. (Pet. 37a.) Petitioners never invoked these procedures.

The protective order thus denied employees of both petitioners and Du Pont access to each other's trade secret/confidential business information.⁴ But more than

³ The ALJ's initial decision, which was adopted by the ITC, was 454 pages long and included 946 findings of fact. (J.A. 665a-1126a.)

⁴ Petitioners convey a misleading impression when they argue that 80 percent of Du Pont's evidence was "confidential." (Pet. 7.)

90 non-employee professionals that petitioners selected to represent them before the ITC had complete access to all Du Pont's information, no matter how competitively sensitive. These representatives included outside counsel, economic consultants and research assistants.

Petitioners sought to modify the protective order to authorize disclosure of Du Pont's confidential information to certain of their employees (*not* to declassify confidential materials). They persistently disregarded the ITC's requirement of an affidavit or other supporting evidence to show a need for such disclosure.⁵ Thus early in the proceeding, petitioners sought access to all Du Pont's confidential information for three in-house lawyers based in The Netherlands and one in the United States. Noting that numerous outside counsel and other representatives of petitioner already had access to this information (Pet. 45a), the ALJ concluded that petitioners had not estab-

They ignore that many of Du Pont's exhibits were "confidential" because they contained *petitioners'* confidential information. Moreover, their 80 percent computation categorizes as "confidential" every document containing any confidential information, while in most cases only a few words, sentences or paragraphs of a document were masked to conceal confidential portions. On this same misleading basis, 78 percent of petitioners' evidence was "confidential."

Similarly, the assertion that 80 percent of the oral hearing evidence was "confidential" ignores that, promptly after each day's hearing, the parties obtained a daily transcript and prepared a declassified version masking only the limited portions that were deemed confidential. Nor do petitioners disclose the fact that they frequently requested that the hearing room be cleared of Du Pont employees because of impending disclosures of petitioners' own confidential business information. (*See, e.g.*, J.A. 20426a, 20733a, 21331a-33a.)

⁵ The ITC's decision in *Certain Rotary Wheel Printers*, 5 I.T.R.D. (BNA) 1933, 1937 (ITC, 1983), requires such proof because "without evidence of the need for the access, there is nothing to weigh against the [adversary's] interests in maintaining confidentiality."

lished any "need" for employee access under the "balancing test" set forth in the ITC's decision in *Certain Rotary Wheel Printers*, 5 I.T.R.D. (BNA) 1933 (ITC 1983). (Pet. 42a.)

Then, on the eve of the evidentiary hearing, petitioners sought access to Du Pont's confidential information for their in-house Dutch counsel and for their senior marketing executive responsible for formulating competitive strategy against Du Pont. Petitioners' counsel focused upon especially sensitive documents revealing Du Pont's marketing plans, financial analyses and projections, and forecasts of sales, revenues and profits. (Pet. 52a-53a).⁶ In response to the ALJ's directive that the parties present evidence in support of their contentions (J.A. 19009a, 19110a, 19116a, 19999a), Du Pont put forward its key aramid fiber marketing executive, who testified as to the competitive harm Du Pont would suffer if this confidential information were disclosed to petitioners' employees. (J.A. 19942a-90a.) As before, petitioners presented no witness or affidavit showing any need for access by their inside management. Applying again the "balancing test" of *Certain Rotary Wheel Printers*, the

⁶ Du Pont's marketing studies and forecasts predicted over a period of years the costs, prices, and volume for each major use to which it was anticipated aramid fiber would be put (J.A. 20992a-20999a). They were based on extensive marketing research and would have been of substantial value to someone breaking into the aramid fiber market, such as petitioners' top marketing executive. These studies were performed wholly without knowledge of the similar marketing studies performed by petitioners, which petitioners designated "confidential" and offered in evidence. (J.A. 17371a, 17397a.)

Petitioners quibble with the court of appeals' correct observation that the information on patent issues was promptly declassified. (Pet. 20a.) The fact is that the direct testimony of Du Pont's inventor and other key witnesses was never classified to begin with, and hearing testimony was promptly declassified in accordance with procedures agreed upon by both parties. (See footnote 4.)

ALJ found that Du Pont's evidence had shown "substantial harm to [its] competitive position" from disclosure to petitioners' employees and that petitioners had not made any countervailing showing of need by their "key management official" and in-house counsel to learn this sensitive information. (Pet. 55a-56a).

C. The ITC's Exclusion Order:

Presidential and Judicial Review.

After receiving submissions from the parties and interested government agencies directed to the question whether an exclusion order or other remedy would accord with the public interest,⁷ the ITC entered a "limited exclusion order" against unlicensed imports of petitioners' aramid fiber made by the process invented and patented by Du Pont. (J.A. 1142a-1143a.) The President did not exercise his power to disapprove the exclusion order under Section 337(g)(2), 19 U.S.C. § 1337(g)(2), and it became effective on January 26, 1986.

Petitioners sought judicial review in the United States Court of Appeals for the Federal Circuit, alleging numerous errors. In a unanimous opinion, the court of appeals rejected each of petitioners' arguments. With respect to the contentions presented here, the court approved the protective order procedures employed by the ITC because Section 337 investigations involve business competitors; require the parties to divulge such competitively sensitive matters as anticipated sales, customers,

⁷ If the ITC determines in accordance with Section 337(a) that unfair acts threaten to destroy or substantially injure a domestic industry, the Commission is required by Section 337(d) to consider separately "the effect of such exclusion [of unfair imports] upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers . . ." 19 U.S.C. § 1337(d). The ITC's "remedy" determinations are reviewable only in accordance with the "arbitrary and capricious" standard of review set forth in 5 U.S.C. § 706. (See Pet. 66a-67a.)

pricing and marketing strategies in order to determine the magnitude of the threatened injury to the domestic industry; and demand prompt exchange of discovery and evidence in order to meet the tight deadlines imposed by Congress for completing the proceeding.⁸ (Pet. 18a-21a.) The court stressed the ITC's strong interest in confidentiality procedures that encourage prompt submission of data by assuring both domestic and foreign parties that their sensitive competitive information will be protected. (Pet. 19a.)⁹ It endorsed the ITC's confidential information "balancing test" as applied in this case (Pet. 19a.), noting that "more than 90 people representing [petitioners] had unrestricted access to Du Pont's confidential information" (Pet. 21a), and that petitioners had "never invoked the dispute resolution procedures of paragraph 10 to challenge Du Pont's characterization of business information as confidential." (Pet. 18a.) It concluded that petitioners had suffered no prejudice of any sort from the protective order procedures. (Pet. 21a.)

REASONS FOR DENYING THE WRIT

The petition presents no issue that warrants review by this Court. No aspect of the court of appeals' decision conflicts with a decision of another court of appeals or an applicable decision of this Court. No question is raised that is appropriate for consideration by this Court in the exercise of its supervisory power or otherwise. The issues presented are without substance

⁸ Section 337 cases must ordinarily be completed within one year of the ITC's decision to initiate an investigation. If the ITC designates a case as "more complicated," as it did in this proceeding, the investigation must be completed within 18 months. *See* Section 337(b)(1).

⁹ The ITC has determined that such confidentiality procedures are "crucial to the Commission's ability to carry out its statutory responsibilities." *Certain Rotary Wheel Printers, supra*, 5 I.T.R.D. at 1935.

and reflect collateral arguments raised by petitioners in an effort to avoid the consequences of their demonstrated misappropriation of Du Pont's patented invention.

I. PETITIONERS DISREGARD THE FACTS THAT UNDERMINE THEIR "DUE PROCESS" CLAIMS AND IDENTIFY NO CONFLICT AMONG JUDICIAL DECISIONS

Through disclosure of all Du Pont's confidential information to more than 90 attorneys, economic consultants and research assistants of their own selection, petitioners were made aware of every document and word of testimony before the ITC. Such disclosure to skilled professional representatives who were thoroughly conversant with the relevant facts and legal issues was of far greater value than disclosure to inside management with limited appreciation of the issues relevant to import relief under Section 337. Accordingly, petitioners' claim is at best wholly theoretical.¹⁰

Petitioners' inside management was denied access only to such confidential trade secret and business information as could be used in petitioners' worldwide competition against Du Pont. In every instance in which evidence or other information was withheld from petitioners' employees, (i) the competitive sensitivity of the information was established; and (ii) petitioners declined to present evidence of any need for disclosure, which left undisputed Du Pont's proof of the serious competitive harm that would result from disclosure to petitioners' additional management representatives.

In the court of appeals, as here, petitioners tried to obscure these facts in order to construct a "due process"

¹⁰ That petitioners' employees played a limited role in the ITC proceedings is shown by the fact that petitioners' principal economic witness found it unnecessary to consult them in the process of learning about the aramid fiber market and reaching the expert opinions offered in his testimony. (J.A. 5383a-94a.)

issue that is not genuinely tendered by the facts of this case. Petitioners contended below, in an argument that has been slightly reworded in the petition, that “under the terms of the protective order, the parties’ designation of materials as confidential had the effect of ‘unilaterally immunizing them from scrutiny by the opposing party.’” (Pet. 17a.) For reasons that are equally applicable here, the court of appeals found that “examination of the challenged protective order, as it was enforced, shows [petitioners’] charges to be groundless” in all respects (Pet. 17a).

Thus, the complaint that “confidential” designations conclusively “immunized” information lacking genuine competitive sensitivity (Pet. 6, 12, 14) foundered on petitioners’ failure to invoke the declassification procedures provided by the protective order. (Pet. 17a-18a.)¹¹ Similarly, the court of appeals rejected petitioners’ assertion that the ITC imposed an unduly heavy burden on requests to disclose confidential information to inside management (Pet. 14); in fact, the ITC applied a reasonable “three-part balancing test to determine whether, to whom, and under what conditions to release confidential information.” (Pet. 19a.)¹² The court of appeals also found that the ITC’s balancing test “cannot be faulted,”

¹¹ Petitioners misleadingly say that they followed the declassification procedures in one instance. (Pet. 16 n.20.) In fact, petitioners did not challenge the propriety of particular confidentiality designations under Paragraph 10 of the protective order, but instead demanded (as they do in this Court) wholesale disclosure of Du Pont’s most sensitive confidential evidence to petitioners’ in-house counsel and chief marketing strategist. (Pet. 47a.)

¹² Under this “three-part balancing test,” the ITC weighs “the need of the party seeking [inside management] access to the information to prepare its case adequately against the harm that disclosure would cause the party submitting the information and the interest of the Commission in maintaining confidentiality.” *Certain Rotary Wheel Printers, supra*, 5 I.T.R.D. at 1940.

because Du Pont had presented evidence showing competitive harm from such additional disclosure while petitioners failed to offer any proof of need for such access by "in-house counsel or key management officials." (Pet. 19a.)

The court of appeals independently concluded, moreover, that there were strong reasons for protecting Du Pont's confidential information from "a direct competitor like [petitioners]." (Pet. 20a.)¹³ With disclosure of all Du Pont's information to more than 90 of their non-employee representatives, petitioners had "failed to demonstrate that [they] suffered actual harm under the confidentiality procedures . . ." (Pet. 21a.) The court also stressed that petitioners' inside management offered its own confidential forecasts and marketing plans to challenge Du Pont's evidence, and petitioners accordingly had ample opportunity to present their own case without needing personal access by their executives to Du Pont's confidential business plans and forecasts. (Pet. 20a.) In this way, the ITC was able to compare each party's evidence, consider the testimony of expert witnesses who had access to all confidential information, weigh the cross-examination by the parties' representatives, and reach its own conclusions.

Petitioners' "due process" contentions are accordingly in conflict with the facts of this case. Having failed to invoke the dispute resolution procedures of paragraph 10 of the protective order to challenge the "confidential" designation of information, petitioners cannot now complain of overclassification. After deliberately declining to offer evidence in response to Du Pont's showing of competitive harm resulting from disclosure to petitioners' inside management, petitioners cannot "confidently pre-

¹³ The sensitivity of the competitive information in question was reinforced during the cross-examination of petitioners' top executive, who testified without qualification that petitioners would be seriously prejudiced by disclosure to Du Pont employees of petitioners' corresponding marketing information. (J.A. 20148a-49a.)

dict" that the ITC's "balancing test" imposed a burden that can never be satisfied "absent action by this Court." (Pet. 12.)¹⁴ And having never tried to show that it was not enough to disclose Du Pont's confidential information to 90 of their chosen representatives, petitioners cannot equate the denial of additional access by their inside management with cases in which a tribunal acts on the basis of "secret evidence" undisclosed to any representative of a party. (Pet. 16.)¹⁵

Petitioners unquestionably enjoyed the fundamental due process right: "a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938). The court of appeals correctly recognized that there is no judicial decision holding that "due process" requires the disclosure of confidential business information to a competitor's inside management. (Pet. 21a.) Petitioners do not identify any such authority. They cite cases in which *no* representative of a party, including its counsel and consultants, was

¹⁴ Petitioners repeatedly argue that the ITC required them to show that additional employee access was "absolutely necessary." (Pet. 11, 12, 14.) Petitioners lift this language, out of context, from the court of appeals' discussion. (Pet. 20a.) In fact, the ALJ did not apply an "absolutely necessary" standard, but held that petitioners failed to "clearly demonstrate a need" for additional inside management access to Du Pont's competitively sensitive information. (Pet. 55a.)

¹⁵ The petition argues that petitioners' outside counsel would have benefitted from discussing Du Pont's confidential information with petitioners' inside management. (Pet. 18.) But if there were any substance to that contention, petitioners should have offered an affidavit or testimony at the hearing in response to the ITC's requirement of supporting evidence. In fact, four of petitioners' employees—including the Marketing Manager for whom petitioners sought access to Du Pont's confidential information—testified at the hearings confidently and without qualification as to future marketing conditions and suggested no need to examine Du Pont's sensitive competitive data.

afforded access to the evidence.¹⁶ They quote language lifted out of context from other decisions that, in fact, reject the "absolute" right asserted by petitioners.¹⁷ And they also rely on cases recognizing the public's interest in the openness of judicial and administrative proceedings, while ignoring that (i) neither petitioners nor anyone else ever requested that *in camera* sessions of the ITC hearings be open to the public; and (ii) no one questioned the need to preserve the confidentiality of the sensitive business information revealed during those portions of the hearing that were *in camera*.¹⁸

¹⁶ *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937); *Morgan v. United States*, 304 U.S. 1 (1938); *Greene v. McElroy*, 360 U.S. 474 (1959); *see also* *Abourezk v. Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir.), *cert. granted*, 107 S. Ct. 666 (1986). Similarly, Justice Cardozo's opinion in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933), commented upon Tariff Commission investigative procedures that denied counsel and all other representatives of a party access to evidence and other information before the Commission.

¹⁷ *Doe v. District of Columbia*, 697 F.2d 1115, 1120 (D.C. Cir. 1983), actually confirms the appropriateness of the kind of balancing analysis conducted by the ITC and recognizes that "when serious harm to a party" cannot be avoided, "the court should issue such a protective order." Similarly, *In Re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981), approved the exclusion of litigants from depositions conducted by their counsel (*id.* at 111) and observed that "harm" to an adversary or some other "direct or material interest" could justify a limitation on counsel's discussing the depositions with his clients (*id.* at 118). And *Helminski v. Ayerst Laboratories*, 766 F.2d 208, 213 (6th Cir.), *cert. denied*, 106 S. Ct. 386 (1985), emphasizes that the due process clause does not give a "civil litigant the absolute right to be present personally" at a hearing, but may be satisfied "so long as the litigant is represented by counsel" and is not excluded "arbitrarily."

¹⁸ In each of the cases cited by petitioners, there was a timely request by a party or other person that the proceedings or written submissions be opened to the public. None of the cases holds that there is an absolute rule against preserving confidentiality; each endorses a case-by-case balancing analysis weighing the inter-

Since they possessed no constitutional right to disclose Du Pont's confidential business information to their inside management, petitioners can derive no superior right from the Administrative Procedure Act ("APA") or the 1974 amendments to Section 337. Petitioners agree that the APA codifies, rather than enlarges, the established due process standards. (Pet. 17 n.22.) Having received a "full due process hearing" under the governing constitutional principles, petitioners were accorded the procedural rights conferred by the APA and the 1974 amendments. (Pet. 17-18.) The court of appeals specifically considered this question and concluded that the ITC accorded petitioners their right under 5 U.S.C. § 555(b) "to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." (Pet. 20a.) Petitioners again cite no decision to the contrary.

II. SECTION 337 DOES NOT DELEGATE TO THE ITC JUDICIAL POWER RESERVED TO THE COURTS UNDER ARTICLE III

Petitioners contend that the ITC acting under Section 337—particularly in adjudicating patent-related issues—exercised judicial power over "private rights" that is reserved to the courts by Article III, Section 1 of the Constitution. (Pet. 22.) The court of appeals rejected this

ests in confidentiality against those favoring disclosure. *See Joy v. North*, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *In Re Continental Illinois Securities Litigation*, 782 F.2d 1302 (7th Cir. 1984); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). Such a case-by-case balancing analysis is even applied in criminal cases, in which this Court has recognized an especially strong presumption in favor of openness. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

argument (Pet. 28a) and petitioners have cited no judicial authority that conflicts with its decision.¹⁹

The court of appeals stressed that, although private rights may be affected by Section 337 investigations, such proceedings embody a "valid delegation" of Congress' power to regulate foreign commerce "for the public purpose of providing an adequate remedy for domestic industries against unfair practices beginning abroad and culminating in importation." (Pet. 28a.)²⁰ One need only read Section 337 and follow the course of this proceeding to see the extent to which public concerns predominate.²¹

It is ironic that the patent validity issues for which petitioners now demand an Article III tribunal are the *defenses* they themselves raised and litigated before the ITC. The Trade Act of 1974 amended Section 337(c) to

¹⁹ The court of appeals termed the argument the "'kitchen sink' or 'let's try anything' approach to appellate advocacy." (Pet. 28a.)

²⁰ The court of appeals cited *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904); *Young Engineers, Inc. v. USITC*, 721 F.2d 1305, 1315 (Fed. Cir. 1983); and *Sealed Air Corp. v. USITC*, 645 F.2d 976, 985-86 (CCPA 1981).

²¹ In no genuine sense does Section 337 establish private rights to relief. A complainant cannot recover damages. Proof of an unfair practice (such as unlicensed use of patent rights) does not entitle a party to relief; the complainant must go further and demonstrate threatened destruction or substantial injury to a domestic industry that is "efficiently and economically operated." Section 337(a). Even then, the Commission has broad discretion to deny any relief after conducting the required remedy proceeding under Section 337(d) to determine the effect of an exclusion order upon "the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers . . ." If the ITC determines that some relief is appropriate, the President may nonetheless disapprove it for "policy reasons" under Section 337(g)(2).

allow such defenses so that the assertion of invalid patent rights would not deny imported products to the domestic market. S. Rep. No. 1298, 93d Cong., 2d Sess. 196 (1974). But in doing so, Congress made clear that the ITC's consideration of such issues was solely "for the purposes of determining whether section 337 is being violated" and that such determinations should "not have a res judicata or collateral estoppel effect" on the patent issues. *Id.* The ITC's patent determinations, in other words, are made in the exercise of the ITC's delegated power to regulate foreign commerce, and do not serve to adjudicate private patent rights. See *Corning Glass Works v. USITC*, 799 F.2d 1559, 1566-67, 1570 n.12 (Fed. Cir. 1986).

Petitioners incorrectly contend that this Court's decision in *Commodity Futures Trading Comm'n v. Schor*, 106 S.Ct. 3245 (1986), rejects the long line of authority which takes account of the "distinction between public rights and private rights" in determining the scope of Article III. 106 S.Ct. at 3259. To the contrary, *Schor* holds that the distinction is not "determinative," but that it embodies the important consideration that there is ordinarily no encroachment on judicial powers when "Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches.'" *Id.*, quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 589 (1985). That, of course, was precisely the court of appeals' rationale in this case—that Section 337 is in substance a delegation to the ITC of the Congressional power to regulate foreign commerce, subject to the President's veto.²²

²² It is also noteworthy that the Executive's veto power over ITC exclusion orders is itself "incompatible with the limitations upon judicial power this Court has drawn from Article III." *Glidden Co. v. Zdanok*, 370 U.S. 530, 582 (1962) (plurality opinion by Justice Harlan); see also *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948).

Petitioners' reliance upon *Schor* is ultimately self-defeating. Here, as in *Schor*, petitioners waived any rights they may have had under Article III through their failure to assert them before they received an adverse decision following completion of evidentiary proceedings before the ALJ. 106 S. Ct. at 3257.

III. THERE WAS NO DENIAL OF "NATIONAL TREATMENT" TO PETITIONERS' ARAMID FIBER

Based chiefly on their "due process" and Article III contentions, petitioners argue that the ITC's procedures denied their products "national treatment" under GATT²³ and the Treaty of Friendship, Commerce and Navigation ("Netherlands Treaty"), between the United States and The Netherlands. 8 U.S.T. 2043, T.I.A.S. No. 3942 (entered into force December 5, 1957). (Pet. 26-28.)²⁴

In the court of appeals, petitioners focused on alleged procedural discrimination against themselves as foreign nationals. They relied on Article V(1) of the Netherlands Treaty, which provides for "national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party . . ." Citing prior authorities that have rejected this argument, the court of appeals observed that the ITC's procedures in Section 337 cases

²³ "GATT" is the General Agreement on Tariffs and Trade, 4 Bevans 639, 61 Stat. 5, T.I.A.S. 1700 (1947), to which both the United States and The Netherlands are parties.

²⁴ Petitioners also contend that they were disadvantaged by their inability to litigate before the ITC a counterclaim alleging that Du Pont was infringing a separate U.S. patent owned by petitioners and used in a different stage of the manufacture of aramid fiber. The court of appeals rejected this argument because (i) petitioners' infringement counterclaim was in no sense a relevant defense to their misappropriation of Du Pont's process patent; and (ii) petitioners' infringement claim was rejected after trial in *Akzo, N.V. v. E.I. Du Pont de Nemours & Co.*, 635 F. Supp. 1336 (E.D. Va. 1986), *aff'd*, 810 F.2d 1148 (Fed. Cir. 1987). (See Pet. 30a-31a.)

are applied evenhandedly to all persons, regardless of their nationality. (Pet. 22a-23a, citing *Certain Spring Assemblies and Components Thereof*, 216 USPQ 225, 231 (ITC 1981), *aff'd sub nom. General Motors Corp. v. USITC*, 687 F.2d 476 (CCPA 1982), *cert. denied*, 459 U.S. 1105 (1983).)

Although petitioners continue to assert that they were personally denied "national treatment," the only treaty provisions they urge upon this Court are Article XVI of the Netherlands Treaty—never cited to the court of appeals—which accords national treatment to the "[p]roducts of either Party" within each other's territory "in all matters affecting internal taxation, sale, distribution, storage and use;" and Article III(2) of GATT, which likewise pertains to the internal taxation and regulation of "products . . . imported into the territory of any other contracting party." (Pet. 27.) But these treaty provisions respecting "products" apply only to the internal treatment of articles "after the importation process has been completed and the goods are 'within the territory of the other Party.'" *In Re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 319, 323 (3d Cir. 1983).²⁵ The treaty terms respecting "products" do "not restrict the rights of the United States to regulate imports" or to "regulate unfair competition from abroad." 723 F.2d at 323-24. Section 337, of course, regulates imports and unfair competition from abroad.²⁶

²⁵ The *Japanese Electronic Products* decision construed Article XVI of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953), which is identical to Article XVI of the Netherlands Treaty. Petitioners concede that the Japanese Treaty and The Netherlands Treaty are two of many such treaties containing "virtually identical provisions." (Pet. 27 n.31.)

²⁶ Petitioners' discussion of United States—Imports of Certain Automotive Spring Assemblies. GATT BISD, 30th Supp. at 107 (May 26, 1983), ignores that the GATT Conciliation Panel decided in that case that Section 337 is exempt from GATT. (See Pet. 29 n.33.)

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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